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In re Application of
Aiba et al.
Application No. 09/690,377
Filed: October 17, 2000
Attorney's Docket No. JG-KM-
4818D/500576.20020

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the petition under 37 CFR 1.137(b), filed on January 4, 2002, to revive the above-identified application.

The petition is **GRANTED**.

A final Office Action was mailed on July 3, 2001. Applicants filed a proposed amendment on October 4, 2001 along with a request for a 1-month extension of time. As indicated in the October 26, 2001 Advisory Action, the proposed amendment did not place the application in condition for allowance and thus was not entered. On December 3, 2001, Applicants filed another proposed amendment and a request for a 1-month extension of time. This proposed amendment, as pointed out in the December 14, 2001 Advisory Action, again failed to place the application in condition for allowance and was not entered.

Both of the above advisory action letters reminded Applicants that the period for filing a proper reply to the July 3, 2001 final Office Action would expire 3 months from the mailing date of that office action, i.e., July 3, 2001, plus extension(s) of time obtained under 37 CFR 1.136(a), if any. Given that a proper reply was not filed¹ on or before December 3, 2001, this application became abandoned on December 4, 2001² for failure to timely submit a proper reply to the July 3, 2001 final Office Action. This petition precedes the mailing of a notice of abandonment.

¹ A required reply to a final Office action, as is in the instant case, must be: the filing of a continuing application under 37 CFR 1.53(b); a request for continued examination (RCE) by filing a submission under 37 CFR 1.114 (for utility or plant applications filed on or after 6/8/95); a notice of appeal; or a proper amendment, i.e., an amendment that *prima facie* places the application in condition for allowance. Since no claims stand allowed in the instant application, an amendment canceling all rejected claims would not be a proper form of reply. See MPEP 711.03(c)(III)(A)(2)(b) (Aug. 2001).

² The 1-month extension of time obtained on 10/4/01, and again on 12/3/01, extended the due date for the reply to 12/3/01. The application thus became abandoned as of 12/4/01. See 37 CFR 1.135; MPEP 711.04(a) (Aug. 2001): “[T]he date of abandonment is after midnight of the date on which the set shortened statutory period, including any [obtained] extensions under 37 CFR 1.136, expired.”

The instant petition encloses a Notice of Appeal as reply to the July 3, 2001 final Office Action,³ the \$1,280 petition fee, the \$320 fee for filing the Notice of Appeal, and a statement that "the abandonment was unintentional." 37 CFR 1.137(b)(3) requires a statement that the **entire delay** in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. Section 1.137(b)(3) further states that the Commissioner may require additional information where there is a question whether the delay was unintentional. While the statement contained in the instant petition varies from the language required by 37 CFR 1.137(b)(3), it is being construed as meeting that requirement. Petitioner must notify the Office if this is **not** a correct interpretation of the statement contained in the instant petition.

Finally, under 37 CFR 1.192, **Applicants must file an Appeal Brief within two (2) months from the mailing date of this decision** to avoid dismissal of the appeal, and subsequently abandonment of this application since no claims stand allowed in this application.⁴ This 2-month period is extendable under 37 CFR 1.136.⁵

The application is being forwarded to Technology Center 3700 to await submission of the appeal brief.

Telephone inquiries concerning this matter may be directed to Petitions Attorney RC Tang at (703) 308-0763.



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³ See note 1, *supra*.

⁴ See MPEP 710.02(d) (Aug. 2001).

⁵ *Id.* (The 2-month non-statutory period is extendable for up to 5 months under 37 CFR 1.136(a), and is further extendable under 37 CFR 1.136(b) in exceptional situations.).